Aboriginal Affairs and Northern Development Canada
Affaires autochtones et Développement du Nord Canada

Renewing the Comprehensive Land Claims Policy:

Towards a Framework for Addressing Section 35 Aboriginal Rights

- September 2014 -

Once finalized, this renewed Policy replaces and supersedes all previous versions of Canada's Comprehensive Land Claims Policy.

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Renewing the Comprehensive Land Claims Policy

***A Note on the Text*:**

Aboriginal people represent the fastest-growing segment of the Canadian population, with close to 50 per cent of the Aboriginal population under the age of 25. The Government of Canada recognizes the importance of working in partnership to create new opportunities for long-term success and economic prosperity and is committed to moving forward with Aboriginal partners across the country to achieve concrete and lasting results.

The Government of Canada acknowledges that these opportunities cannot be unlocked without appropriately addressing Aboriginal and treaty rights, which are recognized and affirmed under Section 35 of the *Constitution Act, 1982*. It is in our collective interest to balance the rights and interests of all Canadians and enable Aboriginal communities to access development opportunities that create jobs, economic growth and prosperity.

To this end, the Government of Canada is developing a new framework for addressing Section 35 Aboriginal rights. This framework will be developed incrementally and through dialogue with partners. As a first step, the Minister of Aboriginal Affairs and Northern Development Canada has appointed Douglas Eyford as the Ministerial Special Representative to lead engagement with Aboriginal groups to further renew and reform the *Comprehensive Land Claims Policy*. This policy was first established in 1973 and the last published update was in 1986. Aboriginal groups have long called for this policy to be revisited and the Government of Canada is answering that call.

To start this dialogue, the Government of Canada is releasing *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*. This interim policy has been released as a starting point for discussions with partners and outlines the Government of Canada's current approach to the negotiation of treaties, including the developments that have occurred since the publication of the last policy in 1986. This interim policy also includes changes in response to previous engagements and the 2013 Eyford Report, as well as the *Principles Respecting the Recognition and Reconciliation of Section 35 Rights* that were jointly developed by the Crown and First Nation leaders, with the support of the Assembly of First Nations, through the Senior Oversight Committee on Comprehensive Claims.

This interim policy is not intended to be comprehensive in nature, exclusive of other potential subjects or representative of a final policy document. Rather it should be taken as an interim policy setting out the Government of Canada's current position at a high level **as a starting point for discussions with partners**. This will allow for a more informed discussion on what should be included in this important first component of the new framework for addressing Section 35 Aboriginal rights. The Government of Canada hopes that this will be the basis for a respectful and constructive dialogue on how we can work in partnership to renew the relationship between Aboriginal and non-Aboriginal Canadians.

The Government of Canada is interested in hearing from you.

Your views will help finalize Canada's renewed policy approach on comprehensive land claims. The Minister of Aboriginal Affairs and Northern Development Canada has appointed Douglas Eyford to lead engagement with Aboriginal groups, other key stakeholders and interested parties based on this document. Engagement will take place through various means, including in-person meetings and by email at article35-section35@aadnc-aandc.gc.ca as well as through online tools http://www.aadnc-aandc.gc.ca/section35. More information about these opportunities for providing feedback is available at the end of this document.

Please visit the Aboriginal Affairs and Northern Development Canada website for more details.

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Foreword

Section 35 Aboriginal rights are recognized and affirmed by the *Constitution Act, 1982*. Addressing Aboriginal rights through negotiation is key to advancing reconciliation with Aboriginal people in Canada. Negotiations lead to positive solutions that balance the rights and interests of all Canadians and provide Aboriginal communities with access to new economic development opportunities that create jobs and economic growth.

The Government of Canada is developing a renewed policy framework to provide more flexible options and opportunities to address Aboriginal rights and interests through dialogue with partners and to update its 30 year old *Comprehensive Land Claims Policy*.

This renewed policy will include tools to advance reconciliation in both the short and long term, so that Aboriginal communities can access the economic benefits that meet their immediate needs as well as those of future generations. Reconciliation promotes a secure climate for economic and resource development that can benefit all Canadians and balances Aboriginal rights with broader societal interests.

In 1973, the first federal policy was announced that set out how the government planned to negotiate and settle Aboriginal rights and title claims (also known as comprehensive land claims or "modern treaties") with Aboriginal people. The policy, which outlines Canada's approach to the negotiation of comprehensive land claims or treaties with Aboriginal groups and provincial/territorial governments, was clarified with the publication of *In All Fairness: A Native Claims Policy – Comprehensive Claims* (1981) and reaffirmed in 1986, with the *Comprehensive Land Claims Policy* (1986).

Canada's policy approach to treaty negotiations has evolved significantly since that time through discussions with Aboriginal groups and provincial/territorial partners at negotiation tables and as a result of various related court decisions.

This interim document outlines Canada's approach to the negotiation of treaties, reflecting the significant changes that have occurred since the publication of the *Comprehensive Land Claims Policy* (1986). It is not intended to reflect all the matters that have been incorporated in the more than 26 modern treaties concluded since 1975. However, these agreements illustrate the flexibility and evolution in Canada's policy approach to comprehensive land claim negotiations.

Canada's renewal of its policy on comprehensive land claims negotiations and development of this document is guided by the principles articulated below.

Principles respecting the recognition and reconciliation of Section 35 rights

The *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Aboriginal rights recognized and affirmed by Section 35(1) are best understood as, firstly, the means by which the *Constitution* recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive

Aboriginal societies, and as, secondly, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfiling both of these purposes.[1] This provides the constitutional framework for reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown which requires processes for achieving reconciliation. Accordingly, Canada acknowledges the importance of ensuring that its relationship with Aboriginal peoples is based on mutual recognition and respect having regard to the following principles of reconciliation that flow from Section 35.

1. Canada recognizes that reconciliation is a fundamental objective of Section 35 of the *Constitution Act, 1982.*

Reconciliation is an ongoing process through which Aboriginal peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together in Canada with a view to fostering strong, healthy and sustainable Aboriginal communities. Reconciliation involves reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown and respectfully balancing Aboriginal rights with broader societal interests. Reconciliation requires compromise and good faith by all parties.

Reconciliation frames the Crown's actions in relation to Section 35 rights and informs the Crown's broader relationship with Aboriginal peoples.

Canada's approach to reconciliation is informed by legal principles articulated by the courts and by negotiation and dialogue with Aboriginal peoples and provincial and territorial governments.

2. Canada recognizes that Aboriginal peoples have existing Section 35 rights and it is on this basis that reconciliation processes occur. Section 35 rights include both Aboriginal rights, including Aboriginal title and treaty rights.

The Courts have stated that there is a spectrum of Aboriginal rights and specific legal tests for proof of Aboriginal rights, including Aboriginal title.

The Government of Canada recognizes that the inherent right of self-government is an existing Aboriginal right within the meaning of Section 35.

3. Canada recognizes that the reconciliation of Section 35 rights is not limited to comprehensive modern treaties, but may include other forms of agreements and constructive arrangements, without the need for extinguishment.

In areas of federal jurisdiction, Canada recognizes that the use of reconciliation processes could lead to modern treaty arrangements or other constructive arrangements including, but not limited to, non-treaty arrangements, contracts, legislation, memoranda of understanding and consultation and accommodation processes.

[1] ***R. v. Van der Peet***, [1996] 2 S.C.R. 507 (para 43).

Through negotiations, with give-and-take on all sides, modern treaties and other constructive arrangements can provide predictability and clarity for Aboriginal peoples and governments regarding their respective rights to ownership, use and management of lands and resources, as well as predictability and clarity for the exercise of Aboriginal self-government within the Canadian federation.

4. Canada recognizes that the honour of the Crown is a guiding principle for the conduct of the federal Crown in all federal processes for achieving reconciliation with respect to Section 35 rights.

The Government of Canada recognizes the importance of upholding the honour of the Crown, which requires Canada and its departments, agencies and officials to act with honour, integrity and fairness in all its dealings with Aboriginal peoples. The honour of the Crown gives rise to different duties in different circumstances.

5. Canada recognizes that the honour of the Crown gives rise to the duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that may adversely affect potential or established Aboriginal or treaty rights.

Canada has established guidelines for federal officials to fulfill the duty to consult. The Crown's efforts to consult and where appropriate accommodate are to be consistent with the overriding objective of reconciliation.

6. Canada recognizes the importance of implementing modern treaties in a manner which upholds the honour of the Crown.

Reconciliation requires that modern treaty provisions are to be interpreted in a reasonable and purposive manner and in accordance with the principles enunciated by the courts in order to find the common intention of the parties, and with due regard for terms negotiated by the parties.

Federal departments and agencies need to coordinate their activities to implement treaties in a timely and diligent manner.

7. Canada recognizes that reconciliation requires justification for any infringement of Section 35 rights.

Canada acknowledges that any infringement of Aboriginal rights requires a justification in accordance with standards established by the Canadian courts and must be attained in a manner consistent with the honour of the Crown and the objective of reconciliation.

8. Canada recognizes that reconciliation can lead to economic prosperity.

Reconciliation promotes a secure climate for economic and resource development that can benefit all Canadians and balances Aboriginal rights with broader societal interests. Reconciliation arrangements can enable Aboriginal peoples to have fair and ongoing access to

lands and resources to support their traditional economies and to share in the wealth generated from those lands and resources as part of the broader Canadian economy.

9. Canada recognizes the importance of working jointly with Aboriginal groups to identify timely and effective processes for the negotiation of modern treaties and other constructive arrangements that address Section 35 rights.

Modern treaties have been and remain the primary means through which Aboriginal peoples and the Crown establish mutually agreed-upon frameworks for reconciliation. However, parties to modern treaty negotiations may have differing views on the nature, scope and location of Aboriginal rights in any particular context.

Modern treaties can provide an enduring framework for ongoing relationships that are constitutionally protected.

During the course of modern treaty negotiations, other constructive arrangements may be considered, including but not limited to, interim measures, treaty-related measures and incremental treaty arrangements, which promote cooperative relations, Aboriginal capacity for modern treaty implementation and predictability and clarity in relation to land and resource management.

It is recognized that there are differences as to how modern treaty negotiations may be conducted across Canada, accounting for regional diversity, Aboriginal perspectives and the interests of provincial and territorial governments.

10. Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Crown-Aboriginal relationships.

Canada recognizes that reconciliation processes including processes for negotiation and implementation of treaties, non-treaty agreements and other constructive arrangements will need to adapt over time in the context of evolving Crown-Aboriginal relationships.

Modern treaties should be capable of evolution and provide predictability for the future as to how provisions may be changed and in what circumstances.

Matters that must be adaptable to change may be set out in companion non-treaty agreements.

SECTION 1: OVERVIEW

Objectives of Negotiations

Canada remains committed to working together through negotiations to address Section 35 Aboriginal rights with the goal of achieving fair and equitable agreements and an enduring reconciliation of rights and interests.

Treaties remain the most comprehensive arrangements that can address Section 35 Aboriginal rights. Treaties establish a mutually agreed-upon and enduring framework for reconciliation and ongoing relationships between the Crown and Aboriginal people. The rights set out in treaties are precise and constitutionally protected. As a result:

- treaties provide lasting certainty regarding the parties' respective rights to ownership, use and management of lands and resources and other rights addressed in treaties, through a fair and enduring settlement of Aboriginal rights claims; and
- self-government arrangements in treaties empower Aboriginal communities to govern their own affairs in a manner which provides predictability and clarity for intergovernmental relations and the application of laws.

Canada acknowledges that not all Aboriginal groups are able to or interested in negotiating a treaty. Reconciliation may include other forms of agreements and arrangements. Examples of arrangements with groups outside of the treaty negotiation process can include consultation protocols, fishery program arrangements, as well as other arrangements related to Section 35 Aboriginal rights. These arrangements can be an effective way to address Section 35 rights in advance of a treaty or as an alternative to a treaty.

Agreements intended to address Section 35 Aboriginal rights will be negotiated within the framework of the Canadian *Constitution*, and will confirm the application of the *Charter of Rights and Freedoms* to Aboriginal governments. Such agreements must be equitable to Aboriginal people and all Canadians.

The participation of provincial/territorial governments in the negotiation of treaties, self-government arrangements and/or non-treaty arrangements, in areas that fall within their jurisdiction is essential to any of these negotiations.

Section 35(4) of the *Constitution Act, 1982* provides that Aboriginal and treaty rights recognized and affirmed in Section 35 "are guaranteed equally to male and female persons." This guarantee is respected by Canada in both the negotiation and implementation of treaties, self-government arrangements and/or non-treaty arrangements.

The general public interest and third-party interests will be respected in the negotiation of any agreements/arrangements and agreements will balance the rights and interests of all.

SECTION 2: SCOPE OF NEGOTIATIONS

Lands and Resources Treaty Negotiations

Negotiated treaties that comprehensively address land and resources may include the following subject matters as part of the final agreement:

a) Certainty
b) Certainty with respect to Non-Land-Related rights
c) Incremental Approaches to Treaty Negotiations
d) Lands
e) Treaty Settlement Lands
f) Shared Territories and Overlapping Claims
g) Trans-Boundary Claims
h) Offshore Areas
i) Wildlife
j) Subsurface Rights
k) Resource Revenue Sharing
l) Environmental Management
m) Capital Transfer
n) Management of Settlement Assets
o) Programs
p) Tax Matters
q) Beneficiaries to the Agreement
r) Dispute Resolution

a) Certainty

The concept of certainty over lands and resources is central to the purpose of treaty negotiations, which provides a respectful framework for reconciliation.

The parties involved in treaty negotiations often have different views and perspectives about the location, nature and extent of the existing Section 35 rights that a specific Aboriginal group holds and can exercise.

Canada seeks to achieve certainty over unresolved Aboriginal rights claims, in relation to land and resources and other rights addressed in the treaty by negotiating agreements that provide for a respectful reconciliation of the rights of the Aboriginal people with the rights of other Canadians. The better the job that negotiators do in comprehensively setting out the terms of a new relationship based on the clearly defined rights and obligations of each party, the greater the certainty for future generations.

This reconciliation respects the continuation of existing Section 35 Aboriginal rights and their coexistence with new treaty rights post treaty, in a legally effective manner that supports the

parties' ability to rely on the negotiated agreement.

To this end, a key item negotiated in treaty negotiations is the certainty or legal reconciliation technique. This legal technique reconciles the coexistence of existing Section 35 Aboriginal rights with treaty rights by enabling the continuation of the group's existing Section 35 Aboriginal rights while ensuring that, to the extent the continuing rights are inconsistent with the treaty, they cannot be used to undermine the agreement of the parties.

Treaties will include clear processes for the amendment of these agreements, providing predictability for the future as to how the applicable provisions may be changed and in what circumstances.

b) Certainty with Respect to Non-Land-Related rights

In addition to provisions dealing with lands and resources, treaties can also include self-government and other provisions, which may cover a range of non land related rights, such as jurisdiction over matters internal and integral to the Aboriginal community (ie. education) as well as cultural or other matters. Canada seeks certainty over non-land-related rights in the treaty. Canada supports options for achieving certainty with respect to non-land-related Aboriginal rights that are not addressed in the treaty through a process for bringing additional non land related rights into the treaty (where the parties agree).

c) Incremental Approaches to Treaty Negotiations

Incremental approaches for addressing Section 35 rights provide a tool for building momentum towards completing a treaty or for addressing the interests of the parties related to Section 35 rights in situations where the conclusion of a comprehensive treaty is far off. Canada may enter into incremental treaty agreements on a tripartite basis, with the province/territory and the Aboriginal group, or on a bilateral basis, with the Aboriginal group, in areas of federal interest.

Incremental approaches can: address Aboriginal interests while negotiations are ongoing; promote cooperative relations during treaty negotiations before a final agreement is reached; remove barriers to progress in negotiations; provide for the implementation of certain negotiated elements of a treaty in advance of a final, comprehensive treaty agreement and help prepare Aboriginal parties to implement treaties. These agreements can be considered at any stage of the broader treaty negotiations.

d) Lands

Treaties will clearly identify the geographic area, outside of treaty settlement lands, where treaty rights are exercisable.

e) Treaty Settlement Lands

Treaty settlement lands selected by Aboriginal parties for their continuing use should be asserted traditional lands that are currently used or occupied. Treaties may recognize that the ownership

of treaty settlement lands is linked to the Aboriginal party's historic presence within their asserted traditional territory.

Treaties will provide Aboriginal parties with secure title to treaty settlement lands. Treaties will include protections limiting expropriation of treaty settlement lands or seizure of treaty settlement lands. Treaty settlement lands give the Aboriginal group the ability to fully realize the economic potential of the land if they choose.

Agreements will provide for public access to selected treaty settlement lands and for right-of-way for necessary public purposes. Access rights pertaining to transportation routes in and through the settlement area must also be provided for.

Self-government treaty provisions set out the jurisdiction of Aboriginal governments over treaty settlement lands and their citizens and provide clarity with respect to the application of Aboriginal, federal and provincial or territorial laws on the settlement lands.

f) Shared Territories and Overlapping Claims

Shared territory and overlap issues are situations in which more than one Aboriginal group has potential or established Aboriginal or treaty rights in the same geographical area.

If left unresolved, shared territory and overlap issues can harm both the process of reconciliation between Canada and Aboriginal groups and the relationships among Aboriginal groups. The resolution of these overlaps is a key interest for all parties.

Aboriginal groups are best placed to resolve shared territory and overlap disputes between themselves. Where there are competing claims to the same geographical area, Canada may consider options in advance of final treaty which support the reconciliation of section 35 rights and encourage Aboriginal groups to resolve the dispute. Canada continues to support Aboriginal groups' efforts to resolve shared territory disputes. Throughout the treaty negotiation process, Canada will consult with Aboriginal groups where there may be potential adverse impacts on asserted or established section 35 rights by a treaty.

g) Trans-Boundary Claims

Where an Aboriginal group currently utilizes resources, in a province or territory, other than that in which its communities are located, the range of benefits available to the group outside its province or territory of residence will be determined by negotiation with the province or territory involved and consultation with any other Aboriginal groups with shared territory or overlapping claims.

h) Offshore Areas

In many cases, the areas traditionally used by Aboriginal groups to pursue their way of life include offshore areas. In such cases, negotiations concerning harvesting rights in offshore areas will be conducted, to the extent possible, in accordance with the same principles as those which

apply to lands. Participation in environmental management regimes and resource revenue-sharing arrangements may also be negotiated with respect to offshore areas.

i) Wildlife

The continuing economic, social and cultural importance of hunting, fishing and trapping for many Aboriginal communities is recognized by the federal government. Accordingly, agreements may provide for preferential wildlife harvesting rights for beneficiaries. There may be exclusive harvesting rights exercised by beneficiaries on selected lands, or preferential rights for particular species throughout the settlement area or within specified parts of the settlement area. In all cases, agreements will clearly define terms by which beneficiaries will have access to wildlife resources.

Unless otherwise provided for in agreements, laws of general application respecting hunting, fishing and trapping activities, including public safety and conservation measures, will apply to beneficiaries.

j) Subsurface Rights

Subsurface resources fall within either federal or provincial jurisdiction. In areas of federal jurisdiction, subsurface rights on some federal Crown lands and on treaty settlement lands held by beneficiaries may be provided through agreements.

Aboriginal ownership of subsurface rights close to their communities, or in critical wildlife habitat areas, may serve as a way to avoid land-use conflict in key areas. Such subsurface rights may also, in appropriate circumstances, provide the beneficiaries of the agreement with the opportunity and incentives to participate in and benefit from resource development.

Holders of subsurface rights must have access to settlement lands, where necessary, for the exploration, development and production of resources. The exercise of such rights will be subject to fair compensation as determined through timely negotiations or by arbitration.

k) Resource Revenue Sharing

Where the federal government has responsibility with respect to natural resources, it is prepared to negotiate resource revenue-sharing arrangements with Aboriginal groups. Such arrangements would provide a percentage of any federal royalties derived from the extraction of resources in a settlement area, including offshore areas.

Where the federal government has responsibility, resource revenue-sharing arrangements will not provide resource ownership rights and will not result in the establishment of joint management boards to manage the subsurface and subsea resources. In addition, the federal government will maintain responsibility for resource revenue mechanisms and must maintain its ability to adjust the fiscal regime.

Resource revenue sharing may be subject to limitations either by:

- an absolute dollar; or
- a time cap of not less than 50 years from the first payment of the royalty share (which arrangement will be renegotiable); or
- a reducing percentage of federal royalties generated, if any.

Any negotiations or arrangements between the federal and territorial governments regarding possible resource revenue sharing must respect any arrangements made in this regard through agreements. The federal government will consult affected Aboriginal groups regarding the implications for unresolved claims of any proposed federal-territorial arrangements on resource revenues.

l) Environmental Management

Treaties will recognize particular Aboriginal interests in relation to environmental issues particularly as these issues relate to wildlife management and the use of water and land. Provision for Aboriginal input on this matter may be afforded through membership on advisory committees, boards and similar bodies or through participation in government bodies that have decision-making powers. Such arrangements must recognize that the government has an overriding obligation to protect the interests of all users, to ensure resource conservation, to respect international agreements and to manage renewable resources within its jurisdiction.

m) Capital Transfer

The monetary component of an agreement may comprise various forms of capital transfers, including cash, resource revenue sharing, or government bonds.

The amount will be clearly defined in the treaty. The amount of the capital transfer may be adjusted depending upon the other arrangements negotiated in treaties. For example, the amount of the capital transfer may be reduced in accordance with arrangements concerning resource revenue sharing. Outstanding debts owed by the Aboriginal group to the federal Crown will be deducted from final settlements.

n) Management of Settlement Assets

Aboriginal governments and corporate structures established in treaties must be designed by Aboriginal groups to provide for the protection and enhancement of treaty assets based on sound management practices and democratic control by the beneficiaries.

o) Programs

Beneficiaries of a treaty will retain their eligibility for government programs, except where a comparable jurisdiction, authority or program has been assumed by an Aboriginal government pursuant to a treaty. Benefits received under such programs that will be determined by general program criteria.

p) Tax Matters

Cash and Lands

The cash component payable under an agreement will be regarded as a capital transfer and will be exempt from taxation. However, any income derived from the cash component will be subject to provisions of the *Income Tax Act*. Other elements of capital transfer of the treaty, such as a share of resource revenues, will be subject to prevailing taxation legislation and practices.

Unimproved lands may be exempted from property taxation except in relation to municipal services.

Tax Powers and Tax Treatment

The tax powers and tax treatment of Aboriginal governments as well as the tax treatment of their institutions and citizens is addressed in the context of self-government negotiations under the *Inherent Right Policy* (1995).

q) Beneficiaries to the Agreement

Those who benefit from treaties must be Canadian citizens of Aboriginal ancestry from the settlement area, or their descendents, or other persons as defined by mutually-agreed criteria. During negotiations, individuals may shift their connection from one negotiation process to another. Ultimately, however, beneficiaries cannot participate in or benefit from more than one treaty. Treaties may provide for beneficiaries to transfer between treaties after they come into effect.

The definition of beneficiaries will not affect the status of persons under the *Indian Act*.

r) Dispute Resolution

Treaties will include processes for the resolution of conflicts or disputes respecting the interpretation, application or implementation of the agreement. Dispute resolution will normally follow a staged approach encompassing collaborative negotiations, facilitation or mediation and arbitration. Use of arbitration should require the consent of all parties to the dispute on matters beyond determination of fact or on technical issues, unless otherwise specified in the treaty.

Self-Government Negotiations

In 1995, the Government of Canada recognized the inherent right of self-government as an existing right within Section 35 of the *Constitution Act, 1982*.

Canada's policy framework for the implementation of the inherent right of self-government is set out in the 1995 publication entitled *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. The document is

commonly referred to as the *Inherent Right Policy* (1995). The *Inherent Right Policy* (1995) sets out an approach for negotiation of practical self-government arrangements that operate within the framework of the Canadian *Constitution*. The scope of negotiations under the policy includes: Aboriginal government structures; jurisdiction or law-making powers; provision of programs and services; and fiscal relations and implementation processes.

Negotiation of Non-Treaty Agreements

Treaty negotiations are one among a range of approaches for addressing Section 35 Aboriginal rights. However, not all Aboriginal groups are interested in negotiating a treaty. Reconciliation includes other forms of arrangements.

Non-treaty approaches can be an effective way to address Section 35 Aboriginal rights. Canada supports negotiation of bilateral arrangements in areas of federal responsibility, including fisheries and marine issues, offshore development, and/or tripartite arrangements in provinces and territories that address economic and strategic interests in stability and predictability over lands and resources.

In areas of federal jurisdiction, Canada may negotiate non-treaty agreements consistent with its mandates for treaty negotiations and the *Inherent Right Policy* (1995). Negotiation of these agreements is open to Aboriginal groups with unresolved Aboriginal rights claims, whether they are in the treaty negotiation process or not. Entry into non-treaty agreement negotiations with Canada will commence once a proposal has been received and approved by Canada.

Aggregation of Aboriginal Groups

Canada continues to encourage aggregated approaches in treaty negotiations, self-government arrangements and non-treaty arrangements. Canada considers aggregation as an effective and affordable way for resource management and governance administration.

Public and Third-Party Interests

In negotiating the rights of Aboriginal people in treaties, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third-party interests will be respected in the negotiation of agreements and, if affected, will be dealt with equitably. Provision must be made for protecting the current interests of non-Aboriginal subsistence users and for the right of the general public to enjoy recreational activities, hunting and fishing on Crown lands, subject to laws of general application.

Information about the general status and progress of negotiations will be made available to the public. In addition, part of the mandate of federal negotiators will be to maintain appropriate and effective communication with those third parties whose interests are directly connected to issues under negotiation.

SECTION 3 – TREATY NEGOTIATIONS PROCESSES AND PROCEDURES

The Process for Treaty Negotiations Outside of British Columbia

The following section sets out general procedures for the initiation and conduct of comprehensive land claim negotiations **outside** of British Columbia.

Statement of Claim

The claims process begins with the preparation of the statement of claim and appropriate supporting materials by the Aboriginal group. A statement of claim should contain the following elements:

- a statement that the Aboriginal group has not previously adhered to treaty;
- a documented statement from the Aboriginal group that it has traditionally used and occupied the territory in question and that this use and occupation continues;
- a description of the extent and location of such land use and occupancy, together with a map outlining the approximate boundaries; and
- identification of the Aboriginal group including the names of the bands, tribes and communities on whose behalf the claim is being made, the claimant's linguistic and cultural affiliation, and approximate population figures for the Aboriginal group.

Acceptance of Claim

Upon receipt of a statement of claim, the Minister of Aboriginal Affairs and Northern Development will review the submission and accompanying documentation and seek advice of the Minister of Justice as to its acceptability according to legal criteria. The Aboriginal group will be advised by the Minister of Aboriginal Affairs and Northern Development, within twelve months, as to whether the claim is accepted or rejected. In the event that a claim is rejected, reasons will be provided in writing to the Aboriginal group.

Preliminary Negotiations

Negotiations toward the development of a framework agreement will be initiated when the Minister of Aboriginal Affairs and Northern Development judges the likelihood of successful negotiations to be high, the settlement of claims in the area to be a priority, and where active provincial and territorial involvement may be obtained as necessary. Negotiations will be

conducted only with groups duly mandated by the Aboriginal group they represent, to the satisfaction of the Minister.

Senior federal negotiators will be appointed by the Minister from within or outside the public service, as appropriate, and will receive initial negotiating mandates from the federal government. Bilateral discussions will be held with the provincial or territorial governments concerned regarding their participation in the negotiations.

Framework Agreement

Framework agreements will be negotiated and will determine the scope, process, topics and parameters for negotiation. Certainty with respect to lands and resources, self-government, and the order and time frame of negotiations will also be identified in the framework agreements.

Framework agreements, and substantial changes to them, will be considered and approved by the federal government.

Agreement-in-Principle

Non-legally binding agreements-in-principle will require endorsement by the Aboriginal group. This may be provided by resolutions of assemblies or by band council resolutions.

Agreements-in-principle will also be considered and approved by the federal government.

Final Agreement

Final agreements will require the approval of the federal government and must be formally ratified by the Aboriginal groups.

Legislation will be passed to give effect to the agreements reached.

As set out in the *Inherent Right Policy* (1995), Canada will require evidence that negotiated agreements have been ratified by the Aboriginal group. The ratification mechanism will also have to comply with legal requirements respecting the transfer of assets.

The British Columbia Treaty Process

In BC, treaty negotiations follow a similar process to elsewhere in Canada. However, in 1990, the governments of Canada and British Columbia, together with the First Nations of British Columbia, established a Claims Task Force to investigate how treaty negotiations might begin in British Columbia and what they should cover. The Claims Task Force made 19 recommendations and suggested a six-stage process for negotiating modern treaties with an independent British Columbia Treaty Commission to oversee and facilitate the process. A tripartite agreement was concluded in 1992; treaty commissioners were first appointed in April 1993; and the treaty process officially began in December 1993.

The treaty process is a six-stage negotiation between the federal government, the provincial government and participating First Nations:

- Stage 1: Statement of intent to negotiate
- Stage 2: Readiness to negotiate
- Stage 3: Negotiation of a framework agreement
- Stage 4: Negotiation of an agreement-in-principle
- Stage 5: Negotiation to finalize a treaty
- Stage 6: Implementation of the treaty

The main difference in the process between outside of BC and the BC treaty negotiation process is that it is open to all First Nations in British Columbia without requirements for submission of statements of claim and supporting materials or for government review and acceptance of claims. The British Columbia Treaty Commission accepts First Nations into the treaty process on the basis of their unresolved claims to Section 35 Aboriginal rights, allocates negotiation support funding and monitors the progress of negotiations.

Implementation

Final agreements must be accompanied by implementation plans that set out the understanding of how obligations contained in the agreements will be fulfilled. The implementation plans are intended to ensure efficient and timely implementation of the various elements of settlement agreements.

The *Inherent Right Policy* (1995) addresses requirements for implementation plans and financial arrangements where self-government is included in comprehensive land claim agreements.

Learn more about the implementation of comprehensive land claim and self-government agreements at https://www.aadnc-aandc.gc.ca/eng/1100100032284/1100100032286

Federal Steering Committee

A committee composed of Assistant Deputy Ministers from government agencies and departments most involved in claims negotiations will continue. The committee reviews and provides advice to Ministers on negotiating mandates, the negotiating process, framework agreements, agreements-in-principle and final agreements.

The committee provides a regular ongoing review, at a senior level, of treaty priorities, negotiating strategies, and operational and policy issues that relate to negotiations, while maintaining an overview of activities across the federal government related to negotiations. Finally, the committee provides policy elaboration and advice, monitors progress and facilitates the participation of all federal departments and agencies as required in negotiation processes.

Glossary

Aboriginal peoples are the descendants of the original inhabitants of North America. The *Constitution Act, 1982* recognizes three groups of Aboriginal people - Indians, Métis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs.

Aboriginal rights are practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right and that existed prior to contact with the Europeans. Aboriginal rights may also include Aboriginal title which is an Aboriginal interest in the land based on long standing use and occupancy of the land by certain modern-day Aboriginal peoples.

Aboriginal self-government are governments designed, established and administered by Aboriginal peoples under the Canadian *Constitution* through a process of negotiation with Canada and, where applicable, the provincial government.

Treaty First Nation is a First Nation that signed a treaty with the Crown.

Provide Us With Your Feedback

The Government of Canada will continue to move forward with its Aboriginal partners across Canada to deliver tangible and lasting results and ensure that Aboriginal communities are well positioned to be full participants in a strong Canadian economy.

Canada believes that public outreach helps to reinforce awareness and understanding of Section 35 rights and the economic opportunities made possible by modern treaties.

The Minister of Aboriginal Affairs and Northern Development Canada has appointed Douglas Eyford as Ministerial Special Representative to lead engagement activities with Aboriginal groups and other key stakeholders based on what you have just read. We are also providing further background information. Mr. Eyford is looking forward to receiving comments and feedback from all interested parties to help finalize the renewed policy.

Please visit the Aboriginal Affairs and Northern Development Canada website at http://www.aandc.gc.ca/section35 for background material and to provide feedback on the renewed policy through various online options or write to the Ministerial Special Representative, Douglas Eyford at:

Policy Development and Coordination Branch
Treaties and Aboriginal Government Sector
Aboriginal Affairs and Northern Development
10 Wellington, 8th Floor
Gatineau (Québec) K1A 0H4